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# IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

TORRY DEMETRIUS HAYWOOD,

Defendant and Appellant.

F036876

(Super. Ct. No. 0653884-7)

**OPINION** 

# THE COURT\*

APPEAL from a judgment of the Superior Court of Fresno County. Lawrence Jones, Judge.

Sung Bae Park, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Robert R. Anderson, Assistant Attorney General, W. Scott Thorpe and Laura Wetzel Simpton, Deputy Attorneys General, for Plaintiff and Respondent.

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<sup>\*</sup> Before Buckley, Acting P.J., Wiseman, J., and Levy, J.

A jury convicted appellant Torry Haywood of reckless driving while attempting to elude a peace officer (Veh. Code, § 2800.2), a felony, and driving without a valid license (Veh. Code, § 12500, subd. (a)), a misdemeanor. In a separate proceeding, the court found true allegations that appellant had suffered a prior "strike," and that he had served a prison term for a prior felony conviction, within the meaning of Penal Code section 667.5, subdivision (b).

The court imposed a prison term of five years, consisting of the two-year midterm on the felony conviction, doubled pursuant to the three strikes law (Pen. Code, §§ 667, subd. (e)(1); 1170.12, subd. (c)(1)), and one year for the prior prison term enhancement. The court sentenced appellant to time served on the misdemeanor conviction.

On appeal, appellant contends the court erred in denying (1) his *Marsden* motion,<sup>2</sup> i.e, his motion for appointment of substitute counsel, and (2) what he describes as his "motion to hire a private counsel." (Unnecessary capitalization omitted.) We will reverse the judgment, and remand for a hearing on appellant's *Marsden* motion.

## PROCEDURAL BACKGROUND<sup>3</sup>

On the first day of trial, the court heard motions in limine, and jury voir dire began. The next day voir dire continued. After a recess, defense counsel moved to have the jury panel dismissed on the ground that appellant "strongly objected" to the racial composition of the jury pool because it contained only one African-American. The court denied the motion. Immediately thereafter, the following colloquy occurred:

We use the term "strike" to describe a prior felony conviction that subjects a defendant to the increased punishment specified in the "three strikes" law (Pen. Code, §§ 667, subds. (b)-(i); 1170.12).

<sup>&</sup>lt;sup>2</sup> People v. Marsden (1970) 2 Cal.3d 118.

Because the facts of the instant offenses are not relevant to the issues raised on appeal, we will forego discussion of those facts.

"MS. KELLY [defense counsel]: Your Honor, Mr. Haywood has just advised me he wants a new lawyer appointed. He is dissatisfied with my representation. So I want to raise it to the Court because possibly he's requesting a Marsden Motion.

"THE COURT: To me this is untimely. You can't, in the middle of jury selection, request a Marsden hearing. At any rate, I won't give one at this point. So if that was the request we can bring [the jury] in.

"THE DEFENDANT: I don't have a chance to hire my own lawyer?

"THE COURT: Now, gee, you had weeks to hire a lawyer. Let's go. Bring them in.

"THE DEFENDANT: I don't understand that.

"THE COURT: Sir. Wait a minute. I've told you, you don't have a right to hire your own lawyer right now. Now this trial is going to go on, with you here or out of here. Do you understand that?

"THE DEFENDANT: No, I don't understand.

"THE COURT: If you disrupt this courtroom, you will be moved out, and the case will go on.

"THE DEFENDANT: I'm no[t] disrupting. I'm asking you why.

"THE COURT: I'm telling you why. It's too late. Bring them in."

#### DISCUSSION

### Marsden Motion

Appellant contends the court erroneously "did not give appellant an opportunity to state his reasons for wanting a new attorney" and therefore "abused its discretion when it denied appellant's motion for a new attorney without conducting a hearing."

Under *Marsden*, "When a criminal defendant seeks substitution of counsel on the ground that appointed counsel is providing inadequate representation, a trial court must give the defendant an opportunity to explain the reasons for the request." (*People v. Mendoza* (2000) 24 Cal.4th 130, 156-157.) "If defendant articulates facts which suggest that counsel is rendering constitutionally ineffective assistance, the trial court has a duty

to make whatever inquiry is necessary to develop a record sufficient to assess the claim [citation]." (*People v. Crandell* (1988) 46 Cal.3d 833, 893-894.) Although no formal motion is necessary, there must be 'at least some clear indication by defendant that he wants a substitute attorney.' [Citation.]" (*People v. Mendoza, supra*, 24 Cal.4th at p. 157.) A defendant is entitled to relief under *Marsden* if he can show that appointed counsel "is not providing adequate representation or that the defendant and the attorney have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result. . . ." (*People v. Smith* (1993) 6 Cal.4th 684, 696.)

The People do not dispute counsel's statement at the outset of the colloquy quoted above was sufficient to trigger the trial court's duty to allow appellant to explain his reasons for his dissatisfaction with trial counsel. And, the People concede, the court failed to comply with this duty, and therefore "error occurred." We agree.

We turn now to the question of prejudice. The People contend the court's failure to allow appellant to state the basis for his motion for the appointment of substitute counsel was harmless beyond a reasonable doubt because, "as the trial court's comments implicitly reveal, the trial court disbelieved that appellant was actually dissatisfied with [trial counsel's] representation . . . ." The People also suggest that because appellant does not raise on appeal a claim of ineffective assistance of counsel, we should infer that had appellant been allowed to voice his complaints concerning trial counsel's performance he could not have alleged conduct constituting constitutionally deficient representation.

The People base the latter contention, in large part, on *People v. Brown* (1988) 46 Cal.3d 432. There, the Supreme Court, in rejecting the defendant's claim that the trial court erred in denying defendant's motion for the appointment of substitute counsel, stated, "We note that defendant has not argued on appeal that trial counsel was incompetent. Thus, we can infer that his *Marsden* motion lacked substance because ineffective assistance of counsel is the foundation which supports the *Marsden* rule.

[Citation.] In any event, after careful review of the record, we conclude defendant's motion fails to show any significant impairment of his right to counsel." (*Id.* at p. 461.)

In *Brown*, however, the defendant did not file his *Marsden* motion until after the jury had returned its verdict in the penalty phase. This is significantly different from a case in which, as here, the *Marsden* motion is made during voir dire.

We conclude also that the fact that the court, without hearing from appellant regarding the basis for his *Marsden* motion, may have concluded that appellant's claim was without merit does not establish the error in the instant case was harmless. Whatever conclusion the court may have reached in the absence of the required hearing cannot establish the failure to grant such a hearing was harmless error.

On the issue of prejudice, we find applicable the following statement from *People* v. Lewis (1978) 20 Cal.3d 496, 499: "Was the error prejudicial? 'There can be no doubt it was. On this record we cannot ascertain that defendant had a meritorious claim, but that is not the test. Because the defendant might have catalogued acts and events beyond the observations of the trial judge to establish the incompetence of his counsel, the trial judge's denial of the motion without giving defendant an opportunity to do so denied him a fair trial. We cannot conclude beyond a reasonable doubt that this denial of the effective assistance of counsel did not contribute to the defendant's conviction.'

We turn now to the question of whether the prejudicial error in the instant case requires outright reversal. In *People v. Minor* (1980) 104 Cal.App.3d 194, an alternative to outright reversal for *Marsden* error was adopted. In that case, the court found error under *Marsden* in the trial court's failure to inquire into a defendant's reasons for requesting the appointment of different counsel. The court stated, "[i]n its disposition of a criminal case the appellate court is not limited to the more common options of affirmance, reversal or modification of the judgment or order appealed from. The court 'may, if proper, remand the cause to the trial court for such further proceedings as may be just under the circumstances.' (Pen. Code, § 1260). . . . But when the trial is free of

prejudicial error and the appeal prevails on a challenge which establishes only the existence of an unresolved question which may or may not vitiate the judgment, appellate courts have, in several instances, directed the trial court to take evidence, resolve the pending question, and take further proceedings giving effect to the determination thus made." (*Id.* at p. 199.) The court held, "[t]he trial record is free of error and there is no indication in the record of inadequacy on the part of trial counsel. The only infirmity in the judgment is the pretrial *Marsden* error discussed above. The question whether good cause existed for appointing new counsel can now be resolved at a hearing in which appellant can be given an opportunity to state his reasons for wanting to have new counsel appointed." (*Id.* at p. 200.)

The *Minor* court reversed for *Marsden* error, but directed the trial court to conduct a post-trial *Marsden* hearing. The appellate court directed the trial court to order a new trial if it determined that good cause for appointment of new counsel had been shown, or to reinstate the verdict if it found that good cause had not been established. (*People v. Minor, supra*, 104 Cal.App.3d at p. 200.) The *Minor* remedy for *Marsden* error has been cited with approval by the Supreme Court (*People v. Hall* (1983) 35 Cal.3d 161, 170) and has been followed by this court in *People v. Maese* (1985) 168 Cal.App.3d 803, 808-810.

We believe the *Minor* remedy is appropriate in the instant case. We recognize, as we discuss below, here, unlike in *Minor*, further error does appear. But, as we discuss below, this error is inextricably linked to the *Marsden* error discussed above, and remand of the sort ordered in *Minor* is also appropriate for such error.

## **Motion for Opportunity to Hire Private Counsel**

Appellant contends the court committed reversible error in "summarily denying appellant's request for an opportunity to hire a private attorney[,]" without giving

appellant the opportunity to "state the reasons for wanting to hire a private counsel" or explain "why his request was made on the first [sic] day of the trial." 4

Because appellant made this request on the second day of trial, it could not be granted without also granting a continuance. (*People v. Turner* (1992) 7 Cal.App.4th 913, 919.) Thus, appellant's motion was, in effect, a motion for a continuance for the purpose of hiring private counsel. In *People v. Courts* (1985) 37 Cal.3d 784, the defendant, represented by appointed counsel, at the trial setting conference requested a continuance for the purpose of retaining private counsel. The trial court denied the request, and the defendant challenged this denial on appeal. The Supreme Court set forth the principles applicable to review of the denial of a request for continuance for the purpose of hiring private counsel.

The court recognized "[t]he right to the effective assistance of counsel 'encompasses the right to retain counsel of one's own choosing.' " (*People v. Courts, supra,* 37 Cal.3d at p. 789.) The court stated, "Both this court and the United States Supreme Court have emphasized that trial courts have the responsibility to protect a financially able individual's right to appear and defend with counsel of his own choosing. 'A necessary corollary [of the right] is that a defendant must be given a reasonable opportunity to employ and consult with counsel; otherwise, the right to be heard by counsel would be of little worth. [Citations.]' [Citations.] In addition, counsel, 'once retained, [must be] given a reasonable time in which to prepare the defense.' [Citation.] Failure to respect these rights constitutes a denial of due process." (*Id.* at p. 790.)

"In view of the importance of these rights and the severe consequences which flow from their violation, the trial courts are required to 'make all reasonable efforts to ensure

As indicated above, on August 22, 2000, the court heard motions in limine, and jury voir dire began. The court denied appellant's request for an opportunity to hire private counsel the following day, as jury voir dire continued.

that a defendant financially able to retain an attorney of his own choosing can be represented by that attorney.' [Citation.] To this end, 'the state should keep to a necessary minimum its interference with the individual's desire to defend himself in whatever manner he deems best, using any legitimate means within his resources . . . . ' [Citation.] [¶] Any limitations on the right to counsel of one's choosing are carefully circumscribed. Thus, the right 'can constitutionally be forced to yield only when it will result in significant prejudice to the defendant himself or in a disruption of the orderly processes of justice unreasonable under the circumstances of the particular case.' [Citations.] The right to such counsel 'must be carefully weighed against other values of substantial importance, such as that seeking to ensure orderly and expeditious judicial administration, with a view toward an accommodation reasonable under the facts of the particular case.' " (People v. Courts, supra, 37 Cal.3d at p. 790, emphasis added.) And in keeping with the need for orderly and expeditious judicial administration, generally "the right [to be represented by private counsel] must be asserted in a timely fashion so that the trial court may, in its discretion and without further inquiry, deny a motion for a continuance to secure new counsel if the motion is made during trial." (People v. Molina (1977) 74 Cal. App. 3d 544, 548, emphasis added.)

To the extent the general rule set forth above is applicable, because appellant requested a continuance for the purpose of hiring private counsel on the second day of trial, the court was entitled to deny that request without further inquiry. However, it is clear appellant's request for continuance was based, at least in part, on his dissatisfaction with his appointed counsel, as revealed by defense counsel's statement that appellant wished to make a *Marsden* motion. And instances of ineffective assistance of counsel, or a breakdown in the attorney-client relationship of such magnitude that a defendant's right to a fair trial is jeopardized, can occur at any stage of the proceedings. (*People v. Smith*, *supra*, 6 Cal.4th at p. 693 [under *Marsden*, criminal defendant may "seek and obtain (upon a proper showing) substitute counsel at any stage of the proceeding in the trial

court"].) Therefore, a request for a continuance to hire private counsel may be timely even though made during trial where, as here, it is based on a claim that appointed counsel is providing inadequate performance. And where a request for continuance to hire private counsel is made on such grounds, the court must allow the defendant the opportunity to state those grounds. (*People v. Molina*, *supra*, 74 Cal.App.3d at p. 549.)

From the foregoing we conclude as follows: The court was within its discretion in denying appellant's motion for continuance as untimely, without further inquiry, to the extent that motion was made for reasons other than the reasons underlying appellant's Marsden motion. But because appellant's motion for continuance was based at least in part on the same grounds as appellant's Marsden motion, and because such grounds may arise at any time, the motion may have been timely. However, because the court did not allow appellant to explain the reasons underlying his Marsden motions, we cannot determine on this record, whether appellant's motion for a continuance was timely. Therefore, the court erred in denying appellant's motion for a continuance without first allowing appellant to explain his dissatisfaction with appointed counsel.

We turn now to the question of remedy. As demonstrated above, appellant may have been entitled to a continuance for the purpose of retaining private counsel, but only if his *Marsden* motion was meritorious. Therefore, remand for a hearing on appellant's motion is the proper remedy for the court's error in denying appellant's motion for continuance. If appellant's motion to discharge appointed counsel is granted, appellant may proceed with retained counsel rather than accept substitution of appointed counsel. Of course, if appellant seeks a continuance for the purpose of hiring private counsel, such a request must be analyzed in light of the principles set forth in *People v. Courts, supra*, 37 Cal.3d 784.

## **DISPOSITION**

The judgment is reversed with directions to conduct a hearing at which appellant shall have a full opportunity to state his reasons for discharging appointed counsel. The

court shall redetermine the motion to discharge appointed counsel in light of *People v*. *Marsden*, *supra*, 2 Cal.3d 118. If the court determines that good cause for the discharge of appointed counsel has been shown, the court shall discharge appointed counsel and set the matter for retrial. In that event, if appellant requests the appointment of substitute counsel, the court shall appoint substitute counsel. Appellant may also proceed with retained counsel. If the court determines that good cause for the discharge of appointed counsel has not been shown, it shall reinstate the judgment.